

Analysis of NSPS as Proposed by the Administration

- NSPS legislation has two main parts
 - Basic principles for establishing a new personnel system: requires OPM-DoD joint-development while permitting national security waiver for specific rules; identifies laws NSPS will not waive; bases system on merit principles, keeps prohibited personnel practices prohibitions, and authorizes national level bargaining
 - Program Specific flexibilities we want
 - Permanent authority for early retirement and retirement incentives, without OPM involvement
 - Elimination of pay offset for reemployed annuitants
 - Flexibility for contracting for personal services outside the United States to support intelligence counter drug missions
 - DoD-wide use of DARPA authority to hire highly qualified experts
 - Authority to direct hire Americans 55 years and older for two year service without any reduction to their Federal retirement incomes
 - Alignment of DoD intelligence personnel overseas pay and benefits with CIA and State Department
- Laws NSPS does not waive
 - Merit system principles (e.g., equal pay for equal work, diverse workforce, open competition for jobs, pay for performance)
 - Prohibited personnel practices (e.g., nepotism, violating veteran's preference, discrimination, reprisals against whistleblowers are against the law)
 - Veterans' preference
 - Leave and attendance, retirement, health benefits, SES management, training, incentive awards, travel, antidiscrimination, suitability, safety/health programs
- Laws that could be waived by NSPS (does not automatically terminate anything in title 5.) We must specifically waive the portions we are going to change. Any proposal to change title 5 processes must be worked with employee representatives, OPM, and Congress
 - Staffing (recruitment, assignment, and reduction in force), pay, positions classification, performance management, labor-management and employee relations, adverse actions, and appeals
- Specific personnel management procedures are contained in the Personnel and Readiness initiative on Best Practices. Department published draft rules on April 2, 2003, for implementing pay for performance/pay banding system in defense laboratories where we have demonstration project authority. Later Federal Register proposal planned for defense acquisition community. Total "demo" community is around 130,000 DoD civilians.

Key Changes in NSPS Legislation Made by House in H.R. 1588

- The House gave us about 75 percent of what we wanted. They took away some flexibility, added some criteria, added more process, and introduced some constraints.
- They took away the opportunity to change training, pay administration (except for overtime, comp time, Sunday/holiday work, firefighter pay), and allowances.
 - This means we cannot provide sabbaticals to non-executives.
 - This means we cannot streamline certain aspects of pay administration (we can still do pay banding).
 - This means we cannot change laws on overseas differentials and allowances.
- They added some criteria.
 - They said that the Secretary's national security waiver may be exercised only at the decision, not just consistent with the direction, of the President.
 - They added General Accounting Office criteria for building a pay for performance system.
- They added more process. They added 30 days to the current 60 days for negotiating with unions. This new 30-day time period is a Congressional cooling-off period during which no action can be taken.
- They introduced some constraints.
 - Requires the President to appoint a non-DoD "independent review panel" to hear employee appeals (in place of the current Merit Systems Protection Board).
 - Adds a provision for parity between military and civilian pay hikes, "to the maximum extent practicable." This is a significant budget issue.
 - Caps the amount that can be paid to highly qualified experts at the Vice President's pay. Under current law, overseas pay and bonuses may exceed that level.
 - Eliminates the opportunity to use experts and consultants for national security missions. There is a broader expert and consultant provision that would allow general hiring of experts and consultants.

Key Changes in NSPS Legislation Made by Senate Bill S. 1166

S. 1166 is sponsored Senator Collins and co-sponsored by Senators Levin, Stevens, Voinovich, and Sununu. On June 17, the Senate Governmental Affairs Committee approved the bill (vote 10-1) with two amendments. Key differences with the House version include the following.

- The Senate bill gives DoD much less flexibility than does either the Homeland law or the House-passed version.
- Compared to Homeland, it prohibits substantive changes to two key, rigid laws: chapter 71 (labor-management and employee relations) and chapter 77 (employee appeals).
- Compared to the House bill
 - It drops the Secretary's national security waiver. This would significantly narrow DoD responsiveness during a crisis. And it could impose, for the first time, Office of Personnel Management oversight of some defense intelligence matters.
 - It has the unintended effect of negating national level bargaining by leaving with the Federal Labor Relations Authority the power to determine whether bargaining occurs and the national or local level.
 - It excludes the Defense labs from participating in NSPS. The end result is that DoD will have to continue its fractured personnel system, the labs are set up as a separate class of employees that do not have permanent ability to use the flexibilities and all items in a lab demo will have to be bargained with each local with labor having a veto to participate.
 - It takes away more opportunity to change existing personnel law.
 - We get hiring flexibility, but we lose, promotions, reassignment and reduction in force flexibility.
 - We lose much flexibility on appeals process, although it permits an internal review process.
 - We lose much flexibility on labor-management relations, although it permits national level bargaining.
 - It makes all of Chapter 55 on pay administration not waivable which drops the language which would have allowed us to change premium pay, overtime and other such payments.
 - It adds more criteria.
 - On performance management, it adds a requirement for employee surveys, for "appropriate independent reasonableness" and requires that system management be "fair, credible, and equitable." Specific yet vague language limits system agility and invites legal challenge.
 - On pay banding, criteria is tied too closely to the current General Schedule and would prevent compensation structures that might go beyond pay banding in the future.
 - On performance system payouts, it requires spending no less than we do today and requires reprogramming notice to change the amount.

- On hiring, it would require that veterans be given preference to all hiring covered under Chapter 31 of title 5 to include SES, ST, SL and attorneys where veterans' preference is not afforded. For the remainder of title 5 hiring, this would confuse existing veterans' preference rules already established in title 5.
 - On premium pay, it would completely eliminate the Department's ability to change such pay as overtime; compensatory time off; wage grade overtime and Sunday rates; night, stand-by, irregular, and hazardous duty differential; criminal investigator availability pay; firefighter pay; and Sunday and holiday pay.
 - On separation incentives, it limits the number to 10,000, but is uncapped for BRAC.
 - On highly qualified experts, it limits the number to 300 (versus 160 today).
- It complicates the process.
 - It only permits a three-year phased implementation with specific employee thresholds each year.
 - It sets time limits for labor issues going to the Federal Labor Relations Authority, when the problem was not time limits but the existence of a third party process that invites protracted disputes.
 - It allows an internal review process for employee appeals, but then allows employees to petition a third party, the Merit Systems Protection Board, although MSPB criteria appears more strict.
 - It drops the older Americans special hiring authority.
 - It specifies that non-NSPS matters will continue to be bargained under current federal labor management law rather than necessarily through national level bargaining.